IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.10.2007

CORAM:

The HONOURABLE MR.JUSTICE V. DHANAPALAN

W.P.Nos.25914, 25875, 25917 and 25607 of 2007

DSQ Software Ltd.,
29/15, 3rd Main Road,
CIT Nagar, Chennai 600 035,
rep. by its Director,
Mr.S.K.Agarwal. ... Petitioner in W.P.No.25914 of 2007

Dinesh Dalmia ... Petitioner in W.P.No.25875 of 2007

B.K.Pal ... Petitioner in W.P.No.25917 of 2007

K.M.Venkateswaran .. Petitioner in W.P.No.25607 of 2007

vs.

1. The Special Director,
Enforcement Directorate,
Ministry of Finance, Government of India,
Department of Revenue, Ist Floor,
Janmabhoomi Chambers,
Walchand Hirachand Marg,
Mumbai 400 001.

2. The Registrar,
The Appellate Tribunal for Foreign Exchange,
4th Floor, B-Wing, Janpath Bhawan,
Janpath, New Delhi. ... Respondents in all WPs

Writ Petitions filed under Article 226 of the Constitution of India praying for the issuance of writ of certiorari calling for the records of the second respondent culminating with its order dated 13.04.2007 passed in Appeal Nos.583, 584, 585 and 586 of 2005, respectively, and quash the same.

For Petitioner in all WPs : Mr.I.Subramaniam,
Senior Counsel
for M/s.M.Vaidyanathan

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For Respondents in all WPs: Mr.V.T.Gopalan,
Addl. Solicitor General of India,
assisted by Mr.P.Wilson,
Asst. Solicitor General of India

C O M M O N O R D E R

Since the issues involved in all the four writ petitions are identical, these writ petitions are decided by this common order.

2. While the petitioner in W.P.No.25914 of 2007 is a Company registered under the Companies Act, 1956 (hereinafter referred to as "The Company"), the petitioners in the other three writ petitions are individuals, who are none other than the Directors of the Company.

3. The facts leading to the filing of these writ petitions, in short, are as under:

(i) DSQ Software Ltd., petitioner in W.P.No.25914 of 2007 is a Company catering to leading software developers in U.S.A. and U.K. In its measures of expanding, the Company was permitted to issue shares under the automatic route and a notification No.FERA/182/98-RB dated 10.02.1998 was issued by the Reserve Bank of India. The Company applied to the Department of Industrial Policy and Promotion, SIA, Government of India on 07.02.2000, seeking its approval for the issue of 3 million shares to foreign entities on a preferential basis and the proposal was approved on 10.03.2000. One of the allottees of the shares was M/s.New Vision Investment Ltd., U.K. Unfortunately, the Company after remitting the application money of Rs.29.59 crores failed to pay the balance call money, despite opportunity being given. The petitioners in other three writ petitions, namely, Dinesh Dalmia, B.K.Pal and K.M.Venkateswaran, who are the Board of Directors in the Company were constrained to forfeit the shares and direct the Company of Rs.29.59 crores to be credited to the Share Forfeiture Account. The decision of the Directors was in accordance with the Articles of Association of the Company.

(ii) A Memorandum bearing No.T4/144/SDE(AKB)/ B/2002 /6135 dated 31.05.2002 was issued by the first respondent to the petitioners and the petitioners had suitably replied to it, that there had been no violation

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of the Foreign Exchange Regulation Act, 1973 (in short "FERA") and that neither the Company nor the Directors were guilty of the contraventions against them. The petitioners also made their point clear that they have complied with all the statutory provisions for the issue of 30,00,000 Equity Shares and have also obtained the requisite permission for the said issue. The petitioners have also produced before the first respondent, the Foreign Inward Remittance Certificate issued by M/s.Indusind Bank Ltd., confirming receipt and credit of Rs.29.59 crores to the Company's Account towards application money. Since the Company has not been in active business from 2001, the first respondent, by its order dated 31.05.2005, imposed penalty of Rs.64,00,05,000/- on the Company and one of the Directors, namely, Dinesh Dalmia and a sum of Rs.31,00,000/- on the other Directors, namely, B.K.Pal and K.M.Venkateswaran.

(iii) Aggrieved by the order of the first respondent, dated 31.05.2005, the petitioners went on appeal before the second respondent Appellate Tribunal in Appeal Nos.583, 584, 585 and 586 of 2005, expressing their financial hardship in paying the penalty. But, the Appellate Tribunal on *prima facie* consideration of the matter has mechanically directed the petitioners to deposit 25% of the penalty imposed within 30 days from the date of receipt of a copy of the order, thereby waiving 75% of the penalty amount.

(iv) According to the petitioners, the first respondent had no authority to adjudicate the matter and a notification cannot supersede the mandatory provisions of the Foreign Exchange Management Act, 1999 (in short "FEMA"), which empowers Special Directors to adjudicate matters arising under the FEMA. Unable to comply with the order of the second respondent, the petitioners have come up before this Court with these writ petitions for the aforesaid relief.

4. The first respondent, namely, the Special Director, Enforcement Directorate, Mumbai, in his common counter affidavit has accepted the facts, that he had conducted the adjudication proceedings at Mumbai and passed the common order, dated 31.05.2005, against which, the petitioners went on appeal before the Tribunal at Delhi and the impugned order regarding pre-deposit was made at New Delhi. The contention of the first respondent is that the petitioners have not disclosed any facts showing the cause of action for filing these writ petitions, having arisen

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fully or at least in any part within the jurisdiction of this Court. According to him, when the order of the original authority made in Mumbai and the impugned order of the Appellate Tribunal made at New Delhi are challenged by the petitioners herein by way of writ petitions, it is an essential pre-requisite for the petitioners to disclose the facts constituting the cause of action in whole or in part having arisen within the jurisdiction of this Court; in the absence of any jurisdictional facts having been disclosed, the writ petitions are liable to be dismissed for the reason of want of jurisdiction under Article 226(2) of the Constitution of India.

5. In the common additional counter affidavit filed on behalf of the respondents, it is stated that for the purpose of deciding territorial jurisdiction of this Court with reference to the orders in question, the only relevant fact is the minutes of the Allotment Committee of the Company, which met at Mumbai on 20.05.2000, which bears the nexus to the orders made by the respondents. It is further stated that the Directors of the Company, in order to wriggle out of their liabilities and violations under FERA, have deliberately chosen to put up a false case as if that inasmuch as 90% of value of shares had not been paid by New Vision Investment Ltd., U.K., the initial 10% were forfeited. According to the respondents, the impugned order of the second respondent Appellate Tribunal projects no error of law apparent on the face of record so as to warrant any interference by this Court.

6. The petitioners, in their reply to the counter affidavit filed by the respondents have clearly set out the facts that form part of the cause of action, to maintain the writ petitions in the jurisdiction of this Court. The facts, as set out in the petitioners' reply to the counter affidavit, are as under:

> (i) A perusal of the order dated 31.05.2005 passed by the first respondent would clearly show that all the events which led to the issuance of the show cause notice dated 31.05.2002 arose at Chennai, where the Registered Office of M/s.DSQ Software Ltd. is situated.
>
> (ii) The approval to convene an Extraordinary General Meeting to consider the issue of the 30 lakh Equity Shares was given at the Board Meeting held on 22.01.2000, and at the Extraordinary General Meeting held at Chennai on 21.02.2000, the share holders approved the issue of the said shares.
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> (iii) Since the Allottee Company, namely, New

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Vision Investment Ltd., U.K., did not pay the balance 90%, a Resolution was passed by the Board of Directors of the Company at a meeting held at Chennai on 29.03.2001, forfeiting the shares allotted to the Allottee.

(iv) The Show Cause Notice dated 31.05.2002 calling upon the Directors in the Company to submit their explanation to the various allegations made therein was received at Chennai.

7. Heard Mr.I.Subramaniam, learned Senior Counsel, assisted by Mr.M.Vaidyanathan, learned counsel for the petitioners in all the writ petitions and Mr.V.T.Gopalan, learned Additional Solicitor General of India, assisted by Mr.P.Wilson, learned Assistant Solicitor General, appearing for the respondents.

8. Learned Senior Counsel appearing for the petitioners in all the writ petitions, has contended that :

(a) the Tribunal has erred in mechanically directing the Directors of the Company, who are the petitioners in W.P.Nos.25607, 25875 and 25917 of 2007 to deposit 25% of the penalty imposed without even considering their capability for depositing the said amount.

(b) the Tribunal has applied the formula applied to the Company to the petitioner in W.P.No.25914 of 2007, despite being shown that the petitioner was only a Non-Executive Director without sufficient means.

(c) the Tribunal failed to note that even a cursory reading of the allegations made against the Company as well as the Directors of the Company would show that there was no infraction either of the FERA or the FEMA.

(d) the Tribunal also failed to note that the first respondent had no authority to adjudicate the matter.

(e) the petitioners, who are at Chennai, the reply to the correspondence made by them at Chennai, the show cause issued at Chennai and the executive General Body Meeting held on 20.05.2000 at Chennai, forms part of the cause of action.

(f) the petitioners can maintain these writ petitions before this Court, as it forms part of the

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cause of action as contemplated under Article 226(2) of the Constitution of India.

9. Learned counsel for the petitioners, in support of his contentions has relied on :

(i) a decision reported in (2006) 6 SCC 207 in the case of Om Prakash Srivastava vs. Union of India and another, and the relevant paragraphs read as under:

"6. Clause (2) of Article 226 of the Constitution is of great importance. It reads as follows:

"226 (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

"7. The question whether or not the cause of action wholly or in part for filing a writ petition has arisen within the territorial limits of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or his threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

8. Two clauses of Article 226 of the Constitution on plain reading give clear indication that the High Court can exercise power to issue direction, order or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action wholly or in part had arisen within the territories in relation to which it exercises jurisdiction notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories.

9. By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the

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plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. (See Bloom Dekor Ltd. vs. Subash Himatlal Desai).

10. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) "cause of action" means every fact, which it is necessary to establish to support a right to obtain a judgment. (See Sadanandan Bhadran vs. Madhavan Sunil Kumar)

11. It is settled law that "cause of action" consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. [See South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises (P) Ltd.]

12. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense, "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in "cause of action". (See Rajasthan High Court Advocates' Assn. vs. Union of India)

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13. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff

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must fail in his suit. (See Gurdit Singh vs. Munsha Singh)

14. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person (see Black's Law Dictionary). In Stroud's Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim;

15. In Halsbury's Laws of England (4th Edn.) it has been stated as follows:

" 'Cause of action' has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

16. As observed by the Privy Council in Payana Reena Saminathan vs. Pana Lana Palaniappa, the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arise from the same transaction. One great criterion when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions. (See Mohd. Khalil Khan vs. Mahbub Ali Mian). "

(ii) yet another judgment reported in (2004) 3 SCC 440 in the case of Special Director and another vs. Mohd. Ghulam Ghouse and another, wherein, the Supreme Court has held as follows:

"6. In the instant case, the High Court has not indicated any reason while giving interim protection. Though, while passing interim orders, it is not

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necessary to elaborately deal with the merits, it is certainly desirable and proper for the High Court to indicate the reasons which have weighed with it in granting such an extraordinary relief in the form of an interim protection. This, admittedly, has not been done in the case on hand.

7. While issuing notice on 07.07.2003, this Court had granted interim stay of the impugned interim order. The respondent had entered appearance and we have heard the learned Senior Counsel on either side. In the fitness of things, taking into the account the above circumstances, we dispose of the appeal with a direction that the proceedings emanating from the show-cause notice shall be continued, but the final order passed pursuant thereto shall not be communicated to respondent 1 (writ petitioner) without leave or further orders of the High Court. ..."

(iii) another decision of the Supreme Court reported in 2006 (204) E.L.T. 513 (S.C.) in the case of Benara Valves Ltd. vs. Commissioner of Central Excise, wherein it has been held as follows:

"8. It is true that on merely establishing a *prima facie* case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequence s flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Silliguri Municipality and Dunlop India cases (supra)

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without analysing factual scenario involved in a particular case.

10. Section 35-F of the Act reads as follows:

"35F. Deposit, pending appeal of duty demanded or penalty levied:-

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue: ...

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of revenue". Therefore, while dealing with the application twin requirements of considerations i.e. Consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view."

10. On the other hand, learned Additional Solicitor General appearing for the respondents has put forth his contentions, that it is an essential pre-requisite for the petitioners to disclose the facts constituting the cause of action in whole or in part having arisen within the jurisdiction of this Court and in the absence of any jurisdictional facts having been disclosed, the writ petitions are liable to be dismissed for want of jurisdiction. He has strenously contended that when the original authority is constituted at one place and the Appellate Authority is constituted at another place, the writ petition would be maintainable at both the places as the order of the Appellate Authority constitutes a part of cause of action. Placing reliance on a ruling of the Supreme Court, the learned Senior Counsel has contended that the mere fact that the petitioners are at Chennai or that the replies to the correspondences made by them or that

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they received the Show Cause Notice at Chennai cannot form any integral part of the cause of action and as such this Court will not have jurisdiction to entertain the writ petitions.

11. Learned Additional Solicitor General has further contended that when all the transactions of the petitioners took place at Mumbai, there is no nexus or connection to the order impugned in these writ petitions to be challenged in the jurisdiction of this Court. According to him, as held by the Supreme Court, the facts pleaded in the writ petitions must have nexus, on the basis of which the prayer can be granted. Therefore, he pleaded that the writ petitions *per se* are liable to be dismissed for want of any cause of action in law.

12. In support of his contentions, learned Additional Solicitor General for the respondents has relied on the following decisions :

(i) In (2004) 6 SCC 254 in the case of Kusum Ingots & Alloys Ltd. vs. Union of India and another, the Honourable Supreme Court has held as follows:

> "14. In State of Rajasthan vs. Swaika Properties, this Court opined that mere service of a notice would not give rise to cause of action unless service of notice was an integral part of the cause of action. The said decision has also been noticed in Oil and Natural Gas Commission. This Court held: (SCC p223, para 8)
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> > "The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action."
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> 15. In Aligarh Muslim University vs. Vinay Engg. Enterprises (P) Ltd., this Court lamented: (SCC p.711, para 2)
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> > "2. We are surprised, not a little, that the High Court of Calcutta should have exercised jurisdiction in a case where it had absolutely no jurisdiction. The contracts in question were executed at Aligarh, even the contracts provided that in the event of dispute he Aligarh court alone will have jurisdiction. The arbitrator was from Aligarh and was to function there. Merely because the respondent was a Calcutta-based firm,

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the High Court of Calcutta seems to have exercised jurisdiction where it had none by adopting a queer line of reasoning. We are constrained to say that this is a case of abuse of jurisdiction and we feel that the respondent deliberately moved the Calcutta High Court ignoring the fact that no part of the cause of action had arisen within the jurisdiction of that Court. It clearly shows that the litigation filed in the Calcutta High Court was thoroughly unsustainable.

16. In Union of India vs. Adani Exports Ltd. (2002 (1) SCC 567) it was held that in order to confer jurisdiction on a High Court to entertain a writ petition it must disclose that the integral facts pleaded in support of the cause of action do constitute a cause so as to empower the Court to decide the dispute and the entire or a part of it arose within its jurisdiction."

(ii) This Court in 2007 (3) L.W. 401 in the case of Sun TV Limited, vs. Tata Sky Limited and another, has held as follows:

"22. As far as the first point for consideration is concerned, it is no doubt trite, as has been held by the Supreme Court in its catena of judgments, that even if a fraction of a cause of action has arisen within the territorial jurisdiction of a court, that is sufficient for the court concerned to entertain a petition which cannot be dismissed on the ground that the court does not have territorial jurisdiction to deal with the said petition. In the instant case, admittedly, while the petitioner is having its registered office in Chennai and carrying on its business in Chennai, the first respondent is having its office in New Delhi and also the Tribunal which has passed the impugned orders is housed in New Delhi. Mr.Habibulla Badsha, learned Senior Counsel for the first respondent, by placing reliance on the judgment reported in AIR 1997 SC 1125 (supra) has vehemently contended that since the Tribunal is located in Delhi, the present petitions which have been filed before this Court and that too before a Single Judge, cannot be maintained on account of lack of territorial jurisdiction by this Court. While attacking this contention of Mr.Habibullah Badsha, Mr.P.S.Raman has contended that the judgment relief on by the former cannot be made applicable to the facts of this case since the Tribunal is not a body instituted under

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Article 323A or 323B of the Constitution but under a statute and this reply given by Mr.Raman sounds to be convincing. Further, it is to be seen that the reach of the package offered by the petitioner is not restricted to one particular area only. Rather, it is going to have nation-wide coverage. That apart, as per the direction of the Tribunal, the petitioner and the first respondent have also held a meeting in Chennai to come to an amicable settlement, but in vain and this is not disputed by the first respondent. In this case, the petitioner has pleaded every aspect of cause of action and the facts pleaded do have some nexus and relevance with the issue involved in this case. Moreover, the ultimate relief if it is granted, it will have an effect of giving signals from the channels owned by Sun TV. Therefore, there is at least a part of cause of action which does offer jurisdiction to this Court as per clause 2 of the Article 226 of the Constitution of India. "

13. A decision rendered by the Supreme Court in 2006 (204) E.L.T. 513 (S.C.) in the case of Benara Valves Ltd. vs. Commissioner of Central Excise, has also been relied on by the learned Addl. Solicitor General appearing for the respondents and the relevant portion reads, as under:

"13. For a hardship to be 'undue', it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant."

14. Heard the submissions made by the learned counsel on either side. Upon perusal of the materials available on record, the points that arise for consideration is of two-fold :

(i) whether on the pleaded facts and circumstances, this Court has got the jurisdiction to entertain these writ petitions?

(ii) whether the petitioners have established a prima facie case and undue hardship ?

15. From the facts of the case, it is seen that the Company is located at Chennai and the Directors of the Company are also residing at Chennai, within the territorial jurisdiction of

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this Court. It is further seen that the show cause notice of the first respondent, dated 31.05.2002 issued to the petitioners has arisen at Chennai. Moreover, the approval to convene an Extraordinary General Meeting to consider the issue of the 30 lakh Equity Shares was given at the Board Meeting held on 22.01.2000, and at the Extraordinary General Meeting held at Chennai on 21.02.2000, the share holders approved the issue of the said shares. Further, on 24.03.2000, an Allotment Committee, consisting the petitioners herein was constituted. Though, the petitioners have not stated the facts leading to the cause of action at Chennai in their affidavit, they have clearly set out the facts and circumstances about the occurrence of several events and other proceedings to maintain these writ petitions within the jurisdictional limit of this Court, in their reply to the counter affidavit of the respondents.

16. It is settled law that "cause of action" consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. It must include some act done by the parties within the appropriate court of jurisdiction. It is also a settled law that "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. The necessary conditions for the maintenance of the petition include not only the infraction of the right, but also the infraction coupled with the right itself. A plain reading of Article 226(2) of the Constitution of India shows that the High Court can exercise power to issue direction, order or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action wholly or in part had arisen within the territories in relation to which it exercises jurisdiction.

17. In the instant case, a perusal of the facts and the materials available on record would clearly go to show that they give rise to a part of cause of action. Therefore, this Court is of the view that the petitioners can maintain these writ petitions within the jurisdiction of this Court, since this Court has got the jurisdictional right to maintain these writ petitions. The question of maintainability is answered accordingly and the writ petitions are maintainable before the jurisdiction of this Court.

18. The second question, as to whether there is *prima facie* case to interfere with the impugned order of the second respondent Appellate Tribunal, waiving 75% of the pre-deposit amount and directing the petitioners to pay only 25% can be decided only in the light of the financial hardship of the Company and its Directors. From the order passed by the second respondent Appellate Tribunal, it is seen that the financial hardship pleaded by the petitioners/appellants, the technical issues relating to

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sunset period and the authority of the Special Director to decide these matters, the exorbitant amount of penalty of Rs.64,00,05,000/-, each against the petitioner Company and Dinesh Dalmia, Rs.31 lakhs each, on B.K.Pal and Venkateshwaran and the statutory period of pre-deposit under the Act, have been taken into consideration.

19. The admission on the part of Dinesh Dalmia about continuing with listing process of 30 lakh shares despite their forfeiture on 29.03.2001 with Mumbai Stock Exchange initiated by writing letter to it on 29.03.2001 and subsequently responding to query of Stock Exchange furnishing details vide letter dated 30.04.2001 including bankers cheque for Rs.50,450/- towards annual listing fees, manipulated transcript of bank account indicating receipt of balance 90% amount of shares i.e., Rs.264.41 Crores from NVIL, U.K. etc. and the payment of the value of the shares have also been taken into consideration by the Appellate Tribunal and therefore, this Court is not inclined to go into the merits of this case at this stage, as the appeal has to be decided after complying with the payment of the pre-deposit amount.

20. Where in any appeal, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of authorities or any penalty levied under the Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied. Provided that where in any particular case, the authority is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the authority concerned may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of revenue". Therefore, as held by the Supreme Court in the case of Benara Valves Ltd., while dealing with an application, twin requirements of considerations, i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

21. As held by the Supreme Court, the above said twin requirements have been taken into consideration by the Appellate Tribunal and waiver has been granted to the maximum advantage of the petitioners, say, for about 75% of the penalty amount and the petitioners were only directed to pay 25% of the penalty amount. It is also seen that the question of controversion of the FEMA or FERA has been taken into account. On a *prima facie* consideration of the issue involved in these writ petitions, the balance of convenience, the revenue loss to the Government and taking note of

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the financial hardship expressed by the petitioners, the order impugned in these writ petitions does not suffer from any legal infirmity and it is perfectly in order. Since there is no scope to interfere with the reasoning of the Appellate Tribunal, the writ petitions are liable to be dismissed.

Accordingly, the order of the second respondent Appellate Tribunal impugned in these writ petitions is upheld and the writ petitions are dismissed. No costs. Consequently, connected M.P.Nos.1 of 2007 in each writ petitions are closed.

After pronouncement of this order, the learned counsel for the petitioners sought the indulgence of this Court to permit the petitioner to deposit the amount as directed by the appellate Tribunal.

At his request, one month time is granted from today.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To :

1. The Special Director, Enforcement Directorate,
   Ministry of Finance, Government of India,
   Department of Revenue, Ist Floor,
   Janmabhoomi Chambers,
   Walchand Hirachand Marg,
   Mumbai 400 001.

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2. The Registrar,
The Appellate Tribunal for Foreign Exchange,
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+1cc to Mr.P.Wilson, Assistant Solicitor General of India Sr 63153

+4ccs to Mr.M.Vaidyanathan, Advocate Sr 63104

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